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Twenty-seventh session

SUMMARY RECORD OF THE 522nd MEETING

Held at Headquarters, New York,
on Wednesday, 1 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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New international economic order: procurement (continued)

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The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Article 12 (continued)

1. The CHAIRMAN invited the Commission to resume its discussion of article 12 of the draft Model Law on Procurement of Goods, Construction and Services.

2. Mr. TUVAYANOND (Thailand) suggested that rather than specifying a price, in article 12, paragraph 3, it might be preferable to say "where the contract price is of a minor amount".

3. Mr. WALLACE (United States of America) agreed, adding that the threshold for services might be different from that for construction or goods. Rather than changing the Model Law, it might be better to state in the commentary that legislators in their individual countries could adapt national regulations.

4. Mr. JAMES (United Kingdom) agreed with the representative of the United States of America that the commentary should specify that each State should enact its own regulations, and that the specific amount might vary, depending on whether the contract involved goods, construction or services. Article 12 was intended to protect the rights of suppliers and contractors, and also those of taxpayers by informing them of the procurements that had occurred and awards which had been made. It was important for the procuring entity to know which awards it was required to publish.

5. Mr. GRIFFITH (Observer for Australia) and Mr. KLEIN (Observer for the Inter-American Development Bank) supported the proposals of the previous speakers.

6. Article 12, as amended, was approved.

Article 13

7. Mr. HUNJA (International Trade Law Branch), responding to a question from Mr. CHATURVEDI (India), said that the point of referring, in line 4, to "any current or former officer or employee" was to try to close as many loopholes as possible. A member of the board of directors of a company, for example, was not, strictly speaking, an employee, hence the need to use both terms.

8. Article 13 was approved.

Article 14

9. Mr. CHATURVEDI (India) said that the expression "that create obstacles to participation" in article 14, paragraph 1, was vague and that the phrase "including obstacles based on nationality" was inappropriate since nationality was a valid criterion for selection in many countries. Furthermore, the inclusion of the words "or services" in the second sentence of paragraph 2 was inappropriate.

10. The CHAIRMAN said that, while it was true that in some countries local contractors were given advantages, the general principle stated in article 14, paragraph 1, concurred with the preference for international procurement outlined in the preamble.

11. Mr. AL-NASSER (Saudi Arabia) said that since the article dealt primarily with goods, there was no reason to include the word "services".

12. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that the reference to services should be included in article 14 and that trademarks could also be used with reference to various services. The field of services was expanding exponentially and the article would certainly have application in the future.

13. Mr. CHOUKRI SBAI (Morocco) said that the issue of services did come up in areas ranging from transport to computers and that it was a concept that was continually evolving. Therefore, he agreed that the reference to services should be retained in article 14.

14. Article 14 was approved.

Article 15

15. The CHAIRMAN suggested that article 15 be approved as it stood.

16. Article 15 was approved.

17. Mr. WALLACE (United States of America) said that, although his delegation had earlier been critical of article 16, it was now convinced that there was no alternative to the current text. Even the extreme measure of providing for the procurement of goods and services under separate heads would cause other objections to be raised. He wished, nevertheless, to suggest a few drafting changes. In article 16, paragraph 2, a description of the method in question should be included in parentheses after each of the articles mentioned and, in article 16, paragraph 3, the term "procedures" should be replaced by "methods".

18. Mr. LEVY (Canada) said that after careful consideration of article 16, his delegation had concluded that in order for the model law to be acceptable to a broad spectrum of States, all the methods listed as options must be retained. The procurement methods listed were merely options and States were free to modify them.

19. With regard to the structure of the article, he was convinced that, short of drafting separate provisions on services, any attempt to restructure the article would create a new set of problems. The Commission should therefore leave well enough alone.

20. Ms. SABO (Canada) said that she could not support the suggestion made by the representative of the United States of America that the term "procedures" should be replaced by "methods". The original Model Law made a distinction between "methods" and "procedures", and the substitution of "methods" for "procedures" would give rise to unnecessary confusion.

21. Mr. WALSER (Observer for the International Bank for Reconstruction and Development) said that he agreed with the views which the representative of the International Bar Association had expressed on article 16 during the meeting of the Working Group held in March 1994. Services throughout the world were generally procured either through tendering procedures or through requests for proposals. Paragraph 3 (b) should therefore be deleted.

22. Mr. CHOUKRI SBAI (Morocco) drew attention to a number of discrepancies between the Arabic and other language versions of the draft Model Law. The French version, for example, contained a reference to "records" which was translated in the Arabic version by a term which meant "register". He would particularly welcome clarification of the term "goods" as used in the draft Model Law. It was important to know whether the term was used as a general concept referring to real or intellectual rights or whether it referred to movable or immovable goods.

23. Mr. CHATURVEDI (India) said that his delegation was in favour of article 16 as currently drafted and did not agree that paragraph 3 (b) should be deleted.

24. Mr. JAMES (United Kingdom) said that after careful examination his delegation had concluded that article 16 as currently drafted represented the best available solution. He did not agree that paragraph 3 (b) should be deleted. It must be borne in mind that enacting States would rely on the Model Law to govern all procurement, the Model Law should therefore make all methods of procurement available to the procuring authority. The sophisticated methods of procurement proposed in Chapter IV bis would be desirable only if the procuring entities had the necessary time and money to devote to the complicated procedures which they entailed. It must also be remembered that routine services were increasingly being contracted out, much of it by tendering or by competitive negotiation.

25. As to which was the better term to use in paragraph 3, whether "methods" or "procedures", he pointed out that Chapter IV bis described not methods but a method of procurement which had a subset of different procedures. A possible compromise would be to use the term "method" in the singular instead of "procedures".

26. Mr. WESTPHAL (Germany) pointed out that paragraph 1 described tendering as the normal method of procurement, while paragraph 3 appeared to suggest that tendering should be used only if there was good reason to do so.

27. Mr. TUVAYANOND (Thailand) said that he supported the use of the term "method" instead of "procedures" in paragraph 3, and the retention of paragraph 3 (b).

28. On the subject of the Commission's method of work, members should be allowed to express their views on any subject, even if the particular subject had been considered by a working group. It must be borne in mind that not all members were represented on working groups.

29. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he supported the position adopted by the representative of the World Bank. It was his impression that the Commission did not have the expertise to adequately deal with all the complexities of the Model Law as it related to services and had therefore sought to ensure that all methods of procurement of goods would automatically be available for services. However, he cautioned that, since many of the methods were unstructured it would be necessary to provide detailed guidelines on how they should be applied.

30. Mr. SHI Zha (China) said that, while the current version of article 16 represented an improvement over the previous text, there was still room for improvement. Paragraphs 3 (a) and (b) did not clearly identify specific methods of procurement of services. The draft text should first identify the methods before describing the procedures governing their use.

31. Mr. MELAIN (France) said that his delegation supported article 16 as currently drafted although it should be read in conjunction with chapter IV bis. He however agreed with the United Kingdom delegation that notwithstanding chapter IV bis, other methods of procurement could be used, particularly when handling the procurement of a small volume of services. Concerning paragraph 3 in the French version of the text, he pointed out that the reference to article 39 bis was no longer correct, since that article had become chapter IV bis.

32. Mr. LOBSIGER (Observer for Switzerland) said that article 16 was sound in that it made a distinction between goods and construction on the one hand and services on the other while respecting the pre-existing structure of the Model Law as approved by the Commission with respect to methods of procurement of goods and construction. That key provision had made it possible to limit the primary methods of procurement of services to one area. The task of reducing the number of methods could be left to national lawmakers. Such a task could be better accomplished if some additional information were provided in a commentary which would reflect the doubts of certain delegations regarding certain secondary methods of procurement and their applicability to the procurement of services.

33. Ms. SABO (Canada) said that the question of whether or not to use "method" and "procedures" could be addressed by the drafting group. Concerning the comment made by the representative of Germany, she noted that unless new methods were given a certain amount of prominence, there was a very real risk that inexperienced procurement entities might not get the best results from tendering. Therefore, article 16 should not be amended. It could be indicated in a general comment that the Working Group's work had been accomplished in the presence of representatives with great expertise in the field of procurement and that even where delegates did not particularly have the expertise they had consulted with experts in their States.

34. Mr. UEMURA (Japan) said that his delegation wished to know whether requests for proposals procedures under the Model Law fell within the meaning of tendering procedures in the General Agreement on Tariffs and Trade (GATT) Agreement.

35. The CHAIRMAN suggested that article 16 should be accepted as currently drafted, and that the suggestions put forward by the observers for the Inter-American Development Bank and the World Bank could be included in the commentary. The latter could even indicate that some States might wish to delete paragraph 3 (b) when they incorporated the Model Law into their own legislation. He agreed with the representative of Germany that it might be better to reverse the order of paragraphs 3 and 2. In response to the concern voiced by the representative of Japan, he noted that while the Model Law did not follow GATT terminology, it did reflect the spirit of the GATT Agreement.

The meeting was suspended from 11.48 a.m. to 12.22 p.m.

36. Mr. HUNJA (International Trade Law Branch), replying to a question from Mr. TUVAYANONI (Thailand), said that in the original Model Law, the first part of article 16, paragraph 2, established the right of the procuring entity to use any of the methods pursuant to articles 17, 18, 19 and 20 and the second part established the obligation to keep a record of the reasons why those methods were used. In the text before the Commission, the two issues were dealt with in separate paragraphs, paragraphs (2) and (4) respectively; the linking phrase "and, if it does" had therefore been deleted.

37. Mr. LEVY (Canada), referring to article 16, paragraph 4, said that the words "relied to justify" might cause problems in interpretation. Where something was not reviewable it seemed unfortunate to require justification, since no matter how inadequate any justification might be there was nothing that a contractor could do. The same problem arose in article 41 sexies, paragraph 1 (b).

38. Mr. WALLACE (United States of America) said that the wording had been chosen quite deliberately in both instances and must stay, since it was a very important part of the Law.

39. Mr. JAMES (United Kingdom) said that he agreed with the representative of the United States. The wording of article 16 reflected a compromise between those who wanted the choice of method to be subject to review and those who felt that it should not be justiciable since it related to an administrative choice, positions which had been reconciled by agreeing that it should be in the public domain. His delegation would be most uneasy should any effort be made to upset that balance. The drafting of article 16, paragraph 4, was, perhaps, ambiguous since it could be interpreted as imposing, in relation to services, a requirement to give reasons where the preferred method of requests for proposals for services was employed, which would be inconsistent with practice under the existing Model Law, and was surely not the intent. The wording of that paragraph should be reviewed.

40. Mr. WALSER (Observer for the World Bank) said that article 16, paragraph 4, simply meant that where a procuring entity used a method other than the normal method it should justify or explain its choice. It might have been preferable to have had a paragraph 3 stating that the normal practice was to use chapter IV bis, a paragraph 4 indicating exceptions in the case of services, and a paragraph 5 referring back to paragraph 4 with respect to services and to paragraph 2 in respect of goods and construction. Such drafting would be much clearer.

41. Mr. KLEIN (Observer for the Inter-American Development Bank), noted that in many States the rule enshrined in article 11 bis that a procuring entity need not justify its rejection of tenders was qualified by a requirement for justification once envelopes had been opened. That qualification was intended to prevent a procuring entity from rejecting all tenders if a preferred contractor had not won.

42. The CHAIRMAN said that he took it that the Commission wished to approve article 16.

43. It was so decided.

The meeting rose at 1.05 p.m.